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SALE TO TRUSTEE OF AN EXPRESS TRUST AS CREATING PERSONAL LIABILITY.

Perry on Trustees, 6th Ed., § 475, announces the principle that in a court of law a trustee is the absolute owner of the estate and is to be treated in this way, "but in equity the *cestui que* trust is the owner, and the question in equity is how far the trustee can act without exceeding his powers, and rendering himself responsible to the *cestui que* trust." This question was quite fully considered in Taylor v. Davis, 110 U. S. 330, where it was held that an action at law could be maintained against a trustee in his individual capacity, where credit was extended for the benefit of the trust estate in his hands.

How ill this principle has been apprehended appears from a majority opinion of four to three by Oregon Supreme Court. Rothchild Bros. v. Kennedy, 169 Pac. 102, at least thus we construe the prevailing opinion.

The facts in this case show that defendant Kennedy became trustee for the creditors of the proprietor of a saloon. The trust instrument authorized the trustee to conduct the saloon business and out of proceeds of sales to pay operating expenses and pay indebtedness already incurred out of what might remain. The trustee also was authorized "to purchase such new stock as may be necessary to keep said business a going concern." The trustee purchased from a traveling salesman liquors to replace those used up, to the amount of $937.77 and, paying $616.54 thereon, claimed there was no liability for the balance, because of an express understanding with the salesman that there was to be no liability beyond a *pro rata* basis the business was able to pay to creditors. There was conflict of evidence regarding this point, but the court held this was resolved in defendant's favor. Therefore the judgment for defendant was affirmed.

The following excerpt from the opinion appears to us to ignore the principle of personal liability of the trustee. Thus it is said:

"It is not necessary to determine whether Cohn could bind his principal (the creditor) by agreeing to sell for prices less than those fixed by the principal; nor is it necessary to decide whether a traveling salesman can obligate his employer to allow discounts or rebates to customers. The defense is not that Kennedy as an individual is only liable to the extent of the amount of the trust assets prorated among the creditors, but that he is not liable at all as an individual. * * * To decide that Cohn had authority to solicit an order from Kennedy as trustee does not decide that Cohn could bind his principal to agree to prorate; and, on the other hand, to decide that Cohn could not bind his principal to prorate does not decide that Cohn could not accept an order from Kennedy as trustee. But to decide that Cohn could solicit and receive orders of goods from Kennedy as trustee upon an agreement exempting Kennedy as an individual is to decide that Kennedy as an individual is not liable, and such decision ends the instant action."

This reasoning presumes that were there a fully authorized agreement, that the trustee could not be held beyond the sum for which he might be reimbursed from the trust estate, this would take away the individual responsibility the law fixes upon him as the legal owner of the property. In our judgment it would do no such thing. He would be personally liable as before, but the measure of his liability would be his reimbursement from the trust estate. By agreement a collateral fact becomes evidence to show the extent of personal liability.

But what is the result of this? It amounts to an agreement by the salesman to allow a possible discount or rebate to a customer. That this cannot be done we

think need not be debated. The customer buying, as we think he did, in his private capacity, does not seem to contend that this could be done. The dissent appears to be better founded in law than the prevailing opinion.

But there is another feature, which appears to require solution in plaintiff's favor. The trust instrument provides first for the trustee to pay the expense of operating the saloon and then "to pay the indebtedness already incurred," the surplus to be accounted for to grantor. Then there is provision for the trustee "to purchase such new stock as may be necessary to keep said business as a going concern."

This provision plainly makes new purchases an "expense of operating the saloon." They are on the same footing as salaries, rents and overhead expense, and, in the same way represent individual liability by the legal owner of the estate. They, therefore, prevent differentiating the defendant as an individual and as a trustee, not to speak of making the agreement of no real force.

NOTES OF IMPORTANT DECISIONS.

BANKS AND BANKING—ACQUIESCENCE BY DEPOSITOR IN BANK PAYING STOLEN CHECK.—In Cherbonnier v. Citizens Nat. Bank, 199 S. W. 307, the Texas Court of Civil Appeals holds, that where a check after being drawn and before delivery to the payee was stolen, the signature of the payee forged and collected by the thief from a bank that forwarded it to drawee bank, the assignment of the claim for reimbursement from the drawee bank, gave to the consignee no right of action, because there was acquiescence by the drawer.

It appears that the drawer authorized its agent to make purchases of grain from farmers and issue checks in its name in payment thereof. One of those checks was stolen as stated above. When it came to drawee bank it was charged against drawer's account. The agent accounted to his principal for the amount because his principal charged it to his account.

The court said: "The pleading shows that the check was paid by drawee bank, charged to the account of (agent's principal) and that (agent) acquiesced in such charge and took up the check alleging that he is the owner and holder of it." Then the court goes on to speak of the agent having the right to resist this charge to the account of depositor and his not doing so, but instead he "voluntarily paid the demand which could not have been collected from him."

There is here a confusing of matters between what the principal did and what the agent did, but whatever was done was between other parties than the bank. The agent certainly had the right to settle a disputed matter with his principal or the principal had the right to bring straight out an action against drawee bank. This it appears to us was the sense of the transaction and in this course there was no representation to the bank. If the principal could have demanded a rectification of matters his assignee could do the same thing. The agent's assumption of the amount paid on the stolen check was not money voluntarily paid so far as the bank was concerned nor was it a voluntary payment even to the agent's principal. It was the purchase of a chose in action.

INSURANCE—"COLOR BLINDNESS" AS EQUIVALENT TO BLINDNESS.—In Routt v. Brotherhood of Railway Trainmen, 165, N. W. 141, decided by Supreme Court of Nebraska, the by-laws of a fraternal association provided for a member recovering full amount of his beneficiary certificate, where he "shall suffer the complete and permanent loss of the sight of both eyes." In the clause it is also provided for full recovery for amputation of a hand at or above the wrist or foot above the ankle joint. The evidence establishes the fact that plaintiff became "color blind" and permanently disabled as a railroad trainman, and so was discharged by his employer. He sued on the theory that he had suffered a complete and permanent loss of both his eyes. He obtained judgment and this was affirmed in the Supreme Court.

The court held that the policy intended to afford insurance for the member in his avocation. "It does not say that he shall become blind in both eyes so as to become unable to see objects of any kind, but that he shall lose 'the sight of both eyes.' This he did when he became color blind. He lost his sight in both eyes. It affected both eyes alike. Besides the color blindness was complete and per-

manent. The thing for which he sought indemnity, loss of his vision, came to him."

This reasoning seems dialectical rather than broadly logical. Perhaps it may be called strictly Socratic. He lost his former vision by acquiring or suffering a changed vision. The same might be said if his new vision were better than the old. Therefore, it would seem that the true inquiry should have been as to impaired rather than lost vision. If it was impaired vision, it was not lost vision. Therefore, further, the issue before the Court was how serious was the impairment.

There was dissent by two members of the Court, as the contract was not to indemnify for disability in a particular vocation. If under this policy a beneficiary could recover for any slighter injury than the things for which full recovery is provided, the contention by the minority is well grounded and yet this less injury might unfit the member as to his avocation.

BANKS AND BANKING—TROVER BY PAYEE OF CHECK PAID BY BANK ON INSUFFICIENT ENDORSEMENT.—In Louisville & N. R. Co. v. Citizens' & People's Nat. Bank, 77 So. 104, there was suit in trover against drawee bank for conversion of a check by the agent of the payee, which agent, instead of depositing the check to the account of his principal, as payee, collected the cash by indorsing the payee's initials and signing his name thereunder. There was demurrer in the trial court, which, being sustained, the Supreme Court of Florida reverses.

The Supreme Court said: "In the case at bar it cannot be assumed that (the agent) had authority to take the check to the bank for deposit to the credit of the plaintiff. Certainly he had no authority to indorse the check for the plaintiff and receive the proceeds, for that is admitted in the demurrer. Therefore, the bank and no one else assumed the responsibility of dealing with Weekly as the plaintiff's agent. The drawers of the check were not at fault, because they made it payable to the plaintiff's order; the plaintiff was not at fault, for it had given Weekly no such commission as he undertook. His authority as the plaintiff's agent ceased, when, as freight agent, he received the check from the makers, as we construe the declaration. Under the circumstances of this case, as shown by the declaration, the liability of (the drawers) upon the account which they owed to the plaintiff, and to pay which they sent the check, would seem to be discharged. There would seem to be no sufficient reason for holding (drawers) responsible for the dishonesty of the plaintiff's agent, whom it had designated to receive the check. As between the plaintiff and the makers of the check, the loss, if any, should fall upon the party more directly responsible for, and having control of, the agent whose dishonesty occasioned it."

The court further says: "There was no question as to the identity of the payee, nor was payment made on a forged instrument. The bank simply assumed the sole responsibility of treating Weekly as the agent of the plaintiff, with authority to indorse its name upon checks and collect the proceeds. It was guilty of negligence for which no one other than itself was responsible."

This case was remanded, but it is conceivable that upon trial it may be shown that this agent had collected in cash such checks and such collection ratified, thus establishing a course of business working an estoppel. But on the other hand, it might appear that plaintiff had no knowledge of such collections, as this agent made, having the duty to collect payment in cash. At all events, it may be thought, that authority of an agent, such as this agent was, having authority to collect cash, would not be departing substantially from the power vested in him, to convert paper received by him, such as a check, into cash and account for it. The makers gave what was the equivalent of cash and it was so accepted. What real harm does the agent do in converting the check into cash? And what harm does the bank do in aiding to this result? The harm was done, not in collecting cash, a thing the agent had the right to do, but afterwards in not accounting for the cash.

CONSTITUTIONAL LAW—ARREST IN OTHER STATE THAN WHERE ALLEGED OFFENSE HAS BEEN COMMITTED.—In Burton v. N. Y. C. & H. R. R., 38 Sup. Ct. 108, it was held that plaintiff had no cause of action against a railroad in which plaintiff was being transported as passenger, in not preventing her arrest and detention by police officers on telegraphic orders. The claim was that the carrier had a duty to protect plaintiff as a passenger from wrongful arrest.

In this case plaintiff was suspected of a serious offense committed in another state but was soon released.

Justice Brandeis said: "The contention is that she could not be legally arrested in New York for a crime committed in another state

except upon compliance with" the statute applying to fugitives in extradition proceedings. But the justice thought this had nothing to do with the matter and "whether the asylum state shall make an arrest in advance of requisition, and if so whether it may be made without a warrant, are matters which each state decides for itself. Such has been the uniform practice, sanctioned by a long line of decisions and regulated by legislation in many of the states." There being therefore no federal right involved, there was no right to invoke any review of New York courts in their holding in this case, that the carrier was not liable. The state courts had held the carrier was not justified in resisting peace officers of the state in making the arrest in question.

BACON'S PROPHECY—THE CHAOS OF CASES.

Lord Bacon said that within three hundred years the world would come to judge between himself and Lord Coke. The three hundred years have passed and the world is reaping the fruit of its decision to follow Lord Coke. These two men held opposing views concerning the origin and nature of law—views so radically and fundamentally different that if the one set be true, the other must necessarily be untrue. Following these two leaders two opposing schools of thought have sprung up, each represented by its leading jurists, authors, and teachers. The school of thought represented by the followers of Lord Coke has, up to the present time, greatly preponderated, in point of numbers. In fact, it may be said that, since the time of Lord Coke the legal world, as a whole, has followed in his footsteps, and, likewise as a whole, has repudiated the fundamental concepts of law held by Lord Bacon.

Up to the present time, however, the fundamental antagonism between the two schools of thought has been only dimly perceived by the great majority even of those who have ranged themselves on the one side or the other, while, so far as the profession at large is concerned, it may be doubted whether it has known that the antagonism exists.

The two ideas, like those of democracy and autocracy in the present world struggle, have until recently been accepted as consistent traveling companions, except for sporadic outbreaks of disagreement. Now, however, the real nature of the two ideas, as shown by their results, is for the first times becoming evident.

Bacon's conception of law was that it consists of ideas which are not created by any human law-maker, but which exist as mental facts, independently of their recognition or non-recognition by humanity. He perceived that as man apprehended or discovered these already existing ideas and incorporated them into his statutes or cases, the resultant system of law would be founded upon the rock of justice, so that when the winds and floods came and beat upon the house, it would stand; whereas, so-called human laws, not founded upon principles of justice, were like a house built upon the sand, which, when the winds and rains should come, would fall, and great would be the wreck thereof.

Coke, upon the other hand, conceived of law as a thing created by statute or decision. He looked upon its as entirely local, as a matter of the fiat of the particular legislature or judge considering the question at issue. He maintained that English law and custom were indigenous to English soil, and were not indebted to foreign sources.

These, in the main, were the differences between the two men. From these differences important results arose.

Bacon believed that the fundamental ideas of the law could be gathered and stated in the shape of maxims or principles, in small compass, perhaps with illustrative cases, explaining the field of operation of each.

Coke, on the other hand, believed in the case system. He issued his Reports, and the world has since then followed his lead,

producing such a mass of reports, undigested and undigestible, that it has become well-nigh impossible to accommodate them on our shelves.

Likewise we have drifted away from Bacon's idea of establishing a few principles and basing decisions on them. Our authors for the most part refuse to cite maxims, our courts to listen to them, or our schools to teach them. The consequence is that the use of maxims is no longer understood, and instead their advocates are often derided.

Notwithstanding this general attitude, it can be demonstrated that the law can be taught from the maxims, as Bacon contended. But before such a demonstration can be made on a large scale, the attitude of the profession must change, and this change can be brought about only when the bar understands the reasons for the present chaotic condition of the law.

As long as lawyers delude themselves with the idea that new principles of law are discovered every decade or two, just so long will we continue to be swamped by the publishing houses with ephemeral works designed to meet the appetite for quantity instead of quality. Publishers are capitalizing our credulous acceptance of their announcements that they are giving us five thousand new principles a year, and that the law is the latest statement of the latest decision.

The fact of the matter is that the fundamental principles of the law consist of a few ideas. They are not type on paper, and are not of human origin. Were this grasped, and these ideas stated sententiously, as the Romans stated them, and were our cases decided in accordance with them, the law would grow naturally and beautifully into a harmonious whole, instead of our having, as is the case in the United States to-day, fifty jurisdictions, each warring with all the others, and with itself also.

The fact of the matter is that whatever of our "American" law to-day is fundamental was reduced to maxim form by the Romans nearly two thousand years ago. This merely amounts to saying that the ideas which express themselves through us to-day, expressed themselves through men ages ago. Ideas are always expressing themselves through human agency, as that agency is able to apprehend and express them.

Take for instance the Baconian maxim, *Verba fortius accipiuntur contra proferentem* (Every presumption is against a pleader); and its cognate maxims, *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged); and, *De non apparentibus et non existentibus eadem est ratio* (—freely translated, Things not alleged are presumed not to exist).

These maxims underlie questions of jurisdiction arising on the face of the record. Yet the Supreme Court of the United States, and the Supreme Courts of the states of Missouri, New York and others have both followed and rejected these maxims, without even mentioning them. A few cases will illustrate this.

In the case of Charles v. White,[1] a creditor brought a simple creditor's bill to subject to the lien of his judgment certain land fraudulently conveyed away by his debtor. The court rendered judgment subjecting the land to the payment of plaintiff's debt, and then further decreed that the title to the land be divested out of the fraudulent grantee and revested in the fraudulent grantor, subject to the payment of his debts.

The Supreme Court properly held that the latter part of this decree, revesting the title in the fraudulent grantor, not being within the issues raised by the pleadings, was void and subject to collateral attack. The court quotes extensively from the celebrated case of Munday v. Vail,[2] and cites numerous other authorities. From the case

(1) 214 Mo. 187.
(2) 34 N. J. Law 418 (cited with other cases L. R. A. 1916 E. 324).

of Waldron v. Harvey,[3] the court quotes as follows:

"A decree, or any matter of a decree, which has no matter in the pleading to rest upon, is void, because pleadings are the foundation of judgments and decrees. There must not only be jurisdiction as to the person affected by the decree by having him before the court by process or appearance, but there must be jurisdiction of the matter acted upon *by having it also before the court in the pleadings. Multitudinous cases attest this elementary axiom of jurisdiction.* If either is wanting, the decree or judgment is void, not merely voidable or erroneous."

In other words, a case must be *coram judice*. Now what, it may be asked, is the "elementary axiom of jurisprudence" above relied upon? Is it not the maxim, *De non apparentibus*, that is, that things not pleaded, are presumed not to exist. The decision in the Charles case is correct, but if the court and lawyers in the case had been familiar with the maxim, and had contented themselves with citing it and a few cases illustrating its application, the report could have been condensed from over twenty pages to perhaps two or three. One important result of a revival of the use of maxims would thus be a saving of shelf room—an item of no little importance in itself. The writing of long opinions is now being condemned by the American Bar Association.

We now, on the other hand, come to the case of Cape Girardeau, etc., R. R. Co. v. St. Louis, etc., Ry. Co.[4] This is an extraordinary case, in that it both affirms and denies the operation of the maxim that things not pleaded cannot be proved. The maxim itself is not mentioned by name, but it is none the less involved in the case. The fact that the same learned judge wrote the opinions in both the above cases, is somewhat of a commentary upon the education of the bar in the use of fundamental procedural maxims.

(3) 54 W. Va. l. c. 613.
(4) 222 Mo. 461.

The facts were that the Cape Girardeau Railroad sued the St. Louis Railroad in ejectment for a strip of land. The answer was a general denial. Plaintiff proved title in itself and that defendant was in possession. Defendant showed it held the land under license from plaintiff. Plaintiff showed notice to defendant, which it claimed to amount to a revocation of the license. Defendant proved that under the license it had made valuable expenditures, which estopped plaintiff from revoking the license. Here was an estoppel *in pais* proved without pleading it, and under a general denial. The court admitted that an estoppel *in pais* must be pleaded, but held that, where the parties have nevertheless gone into the trial and proved facts unsupported by their pleadings, it was too late to object on appeal to the absence of the pleadings.

Now we submit that, on the premise laid down in the Charles v. White case above, that pleadings are jurisdictional, and that a judgment not based on the pleadings is void, it is impossible for the parties to confer jurisdiction on the court, by way of waiver, growing out of their conduct at the trial. Jurisdiction of subject-matter is not a matter of waiver, nor is it within the power of parties to confer jurisdiction of a subject-matter on a court; "consent cannot confer jurisdiction." The state is here a third party in interest, and it has prescribed how jurisdiction may be vested, to-wit, by pleading a cause of action. An attempt by litigants to waive the demands of the state is *Res inter alios acta* and of no effect.

The case of State ex rel. v. Muench[5] strongly supports the statement last made, and is entirely inconsistent with the *Cape Girardeau case*, although the judge who wrote the opinion in the Charles v. White and Cape Girardeau cases also concurred in the *Muench case*. Let us digress to the

(5) 217 Mo. 124.

Muench case for a moment, returning to the *Cape Girardeau case later.*

In the *Muench case* a bill was filed to appoint a successor to a trustee under a will. The successor was duly appointed, but instead of stopping there, the decree went on to provide that the court retained jurisdiction of the further administration of the estate by the new trustee. Attorneys for McManus, one of the heirs, O. K.'d this decree. Later the court made an order allowing attorney's fees. This also was O. K.'d by McManus' attorneys. Neither decree nor order was appealed from. Later the court made an elaborate order for the sale of some of the property, to pay certain charges against the estate. McManus sued out a prohibition against this sale. It was argued against McManus, in the Supreme Court, that he had approved the proceedings in the court below. But the court held that parties could not waive jurisdiction of the subject-matter; that the subject-matter, as shown by the pleadings, was the appointment of a new trustee and nothing else, and that in attempting to administer the estate, the action of the court was *coram non judice* and void.

The court said, in part, p. 137:

"But in modern jurisprudence a court remains passive until issues are framed in accordance with written law and their judgments must respond to such issues. A judgment is 'the sentence of the law upon the record.' It is the application of the law to the facts and pleadings. Any other view would be illogical and tend to confusion and chaos in the administration of justice."

The court then cites numerous authorities in support of its pronouncement.

Concerning the argument that the decree was a consent decree, the court says, p. 141:

"But if the chancellor, as we have held. reached out his arm too far and grasped a jurisdiction not within the issues, then that part of the decree outside the issues became *coram non judice* and void. In that view of the case no appeal was necessary, and the void part of the judgment is subject to collateral attack."

The holding in the *Muench case,* like that in the *Charles v. White case,* is, in substance, an affirmation of the old maxim that what is not pleaded cannot be proved, or, expressed in Latin, *Frustra probatur quod probatum non relevat.*

What, then, becomes of the holding in the *Cape Girardeau case,* that without pleadings, parties can confer jurisdiction on the court in derogation of the above maxims?

But the *Cape Girardeau case* having first disallowed the maxims as above stated, proceeds in another branch of the case to enforce them, both conclusions operating against the plaintiff.

The decree below had given plaintiff judgment in ejectment and $3,000.00 damages against defendant for occupancy of plaintiff's land. The Supreme Court, having, as above stated, reversed the judgment in ejectment, because of the unpleaded *estoppel in pais* against plaintiff, comes to the question whether the judgment for $3,000.00 in plaintiff's favor can stand. The court decides this question in the negative on the ground that "there is no allegation of the relation of landlord and tenant, and hence it fails to state the essentials of a cause of action for use and occupation."

But, although the fact of the existence of the relation of landlord and tenant, or licensor and licensee was not pleaded, nevertheless the evidence showed the existence of such a relationship. So that on the court's own previous reasoning it was immaterial whether the existence of such a relation was alleged in the pleadings.

As to these very facts, the court said, in deciding against plaintiff on the ejectment issue, p. 411:

"With these telegrams in evidence *and the proof that by the permission therein granted, defendant entered and constructed its tracks,* we think the facts were before

the court, whether formally pleaded or not, and it is now too late to raise the question of pleading for the first time."

If such reasoning is correct, it would seem to follow that this proof having established the relationship of licensor and licensee between the two railroads, plaintiff was entitled to recover for the use of its land by defendant under that license.

Therefore it would seem to follow that if evidence in favor of the defendant, introduced without supporting pleadings, was entitled to consideration, then likewise evidence in favor of plaintiff should also have been considered, though also unsupported by pleadings.

It is submitted that the only true rule is that facts not alleged cannot be proved or considered at any stage of the proceedings.

That the condition of conflict over the application of procedural maxims obtains in other jurisdictions than Missouri, see the following sets of conflicting decisions:[6]

A long line of decisions in the United States Supreme Court, commencing with the earliest cases, lays down the rule, in varying forms, that pleadings are jurisdictional, and that evidence must be based on the pleadings.[7]

On the other hand, other decisions hold that the pleadings can be waived.[8]

A notable departure from the English cases and much precedent is discoverable in Kirk v. Hamilton,[9] when compared with Lester v. Foxcroft.[10]

(6) Slacum v. Pomery, 6 Cranch 221, 225; Vicksburg v. Henson, 231 U. S. 259, 269; Garrett v. L. & N. R. R., 235 U. S. 309, 313.

(7) Dean v. Davis, 242 U. S. 432, 447.

(8) 102 U. S. 68-79.

(9) White & Tudor's Lead. Cases in Equity cited in Halligan v. Frey, 49 L. R. A. 112-122, with notes.

(10) Bartlett v. Crozier (by Kent, reprinting Rushton v. Aspinall), 17 Johns 428, 8 Am. Dec. 428; Walrath v. Ins. Co., (1916) 216 N. Y. 220.

(11) Frear v. Swett, 118 N. Y. 454; Baily v. Hornthal, 154 N. Y. 648, 61 Am. St. 643 (a decree may be supported by oral statement of counsel).

In New York the same conflict obtains. For the strict pleading rule, see cases cited.[11]

The Walrath case is one of the best cases ever written along these lines.

On the other hand, there are many New York cases denying the necessity of pleadings.[12]

A key that leads to the conflicting views in New York is Clark v. Dillon;[13] it is upheld and denied in alternation; it is widely cited.

The Baily case may be classed with Gulling v. Bank,[14] which holds that pleadings can be waived (dissenting opinion). Other cases that so hold are cited in L. R. A. 1916 E 298-326, which is the most extensive discussion of pleadings as a negligible element at the stage of Collateral Attack.

These same conditions exist in the District of Columbia and the states it follows, like Maryland, the Virginias, Illinois, Mississippi, and Michigan.

It is enough to say that a lawyer equipped with these decisions can make the law appear to the court in any shape he pleases. What a comment this is on our boasted "American" law! In the light of these facts, can it be said that we are improving or developing the law? Is it not, on the contrary, true that the law is being slowly disintegrated and undermined?

These are matters, not of procedure only, but also of "substantive law," notwithstanding we are taught that there is a distinction between the two kinds. Take, for instance, the Cape Girardeau case, above cited, where the plaintiff's "substantive" rights were entirely dependent upon the court's correct use of procedural rules—existent if the court understood and applied the rule; non-existent if it did not.

What shall be said of our American authors on procedure who fail to teach the state's interest in a record sufficient for

(12) 97 N. Y. 370.

(13) 29 Nev. 257-280.

(14) Sec. 2310.

the purposes of *res adjudicata*—a record which presents on its face a judgment based upon pleadings, thus showing what was decided and terminating the litigation once and for all, in compliance with the maxim, *Interest reipublicae ut sit finis litium?*

What shall be said of leading authors like Pomeroy, of New York, and Thompson, of Missouri, who fail to instruct us concerning these matters? Pomeroy's Code Remedies appeared in 1875; Thompson's Trials appeared in 1878. Neither they nor their editors cited Bartlett v. Crozier, Clark v. Dillon, or Slacum v. Pomeroy, above mentioned. Thompson says, "The jury find from the evidence, and not from the pleadings."[15]

Statements like the above from our leading American lawyers have led to the condition where our judges are deciding principles both ways in the same case. Is it any wonder that lawyers like Frederic R. Coudert, of New York, say, "The condition into which the law has fallen is due primarily to incompetency both at the bar and on the bench?"[16]

Is it any wonder that ex-Secretary Garrison says of the law:

"Little by little the very foundation stones of the structure are being disintegrated or undermined. The means by which this is being accomplished are so subtle and insidious that few are even aware of the fact, and there is not only no numerous army of defense, but the small handful who do utter warnings are unheeded. Their warnings fall upon deaf ears, they are scoffed at as reactionaries, as being wedded to the past, and incapable of appreciating modern ideas and the necessities of progress. The whole popular tendency of the times is averse to the calm, steady consideration necessary to reach proper conclusions."

It would seem to be high time that a restatement of the law be attempted, based upon the principles or maxims of procedure upon which depend all substantive rights, and which involve an understanding of the state's position as a silent third party to all litigation.

EDWARD D'ARCY.

St. Louis, Mo.

(15) 1911 Am. Bar Assn. 681.
(16) 41 Am. Bar Rep. 376.

DIVORCE—DECREE VESTING TITLE.

165 N. W. 753.

EMMONS v. EMMONS.

Supreme Court of Michigan. Dec. 28, 1917.

In suit for divorce, decree giving wife "use, benefit, and possession" of land, until further order of court, requiring husband to convey the land, and further ordering that further consideration of alimony and property be reversed for further order, did not vest wife with fee, and on her death, though no further order was ever made, the husband, and not her children, were entitled to the land.

MOORE, J. This is an action in ejectment. At the close of the testimony the judge directed a verdict in favor of the plaintiff. The case is brought here by writ of error.

The facts are not in dispute. It is conceded that prior to November 28, 1898, the plaintiff was the owner in fee of the land in controversy. On that day the wife of the plaintiff was granted a decree of divorce upon the ground of desertion. There was in the decree the following:

"And the court doth further order, adjudge, and decree that said complainant, Mary Emmons, from the date hereof have and enjoy the use, benefit, and possession of the land above described with all the appurtenances thereunto belonging until the further order of this court.

"And the court doth further order, adjudge, and decree that said defendant, Albert C. Emmons, forthwith convey by proper deed, to the said complainant, Mary Emmons, the real estate above described with all appurtenances thereunto belonging, and that, if he shall for three months from the date hereof fail and neglect to make conveyance as aforesaid, that this decree stand and be regarded as such conveyance, and a certified copy thereof may be recorded with the register of deeds of said county as evidence of such conveyance.

"It is further ordered that the further consideration of the question of alimony and the property interests involved in said cause be and the same are hereby reserved for further order and decree herein."

The plaintiff made no conveyance. The decree was recorded in the office of the regis-

ter of deeds on the 1st day of March, A. D. 1898. Mary Emmons named as complainant in said decree died on the 6th day of September, 1915, leaving as her children and heirs at law the defendant, William Emmons, and Effie Smith, Lottie Riley, and Ettie Sherrard. Effie Smith, Lottie Riley, and Ettie Sherrard since becoming of age and previous to the commencement of this suit conveyed whatever right, title, or interest they had in the above-described lands to the defendant, William Emmons, who was in possession of said lands at the time of the commencement of this suit. It is also admitted that Mary Emmons had the actual possession of the said premises continuously from the date of the decree to the time of her death. It was not shown that the decree was ever modified.

It is conceded the defense hinges upon the provisions of the decree. The claim of counsel is stated in the brief as follows:

"We insist that the decree does not grant to her the title to said land in fee simple. True it is that this title may be a base or qualified title in fee simple, and not a fee simple absolute; but it is equally true that the estate granted by the decree is at least a base or qualified estate in fee.

"A base or qualified fee is an interest which may continue forever, but which is liable to be brought to an end by the operation of some act or event limiting its continuance or extent." 2 Blackstone, Com. 109; 4 Kent, Com. (12th Ed.) 9.

"In case the event which limits the duration of a base fee does not happen during the life of its owner, the estate will descend to his heirs subject to the specified determination." 2 Blackstone, Com. 109; 4 Kent, Com. (12th Ed.) 9, 10."

It is contended that, as the decree was never modified, upon the death of Mrs. Emmons her children would inherit the real estate which is the subject of this suit.

The diligence of able counsel has not called to our attention any authority that is controlling. The authority to make decrees in relation to alimony and the division of the property in cases of divorce is purely statutory, and is conferred by chapter 232, Compiled Laws, now chapter 217, C. L. 1915.

In Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496, Ann. Cas. 1913A, 800 Justice Steere, speaking for the court, discusses quite at length the principles which should control in providing permanent alimony and the authority which gives the court of chancery its power to make decrees in relation thereto. In the course of the discussion it is said:

"Alimony, by whatever authority it is conferred, is an incident of marriage, and based on the underlying principle that it is the duty of the husband to support his wife, not necessarily to endow her. Primarily it signifies, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life during his separation, whether it be for life or for years. In practical application an award of permanent alimony in a gross sum may result in a division of the husband's estate; but the controlling element not to be lost sight of is his compulsory contribution for her support and maintenance under obligations of the marriage contract."

The record does not disclose the amount of property possessed by either Mr. and Mrs. Emmons at the time the decree in the divorce case was made. It must be conceded that the language of the decree is somewhat ambiguous. It is clear that the judge meant to decree to Mrs. Emmons personally the "use, benefit, and possession of the land * * * with all the appurtenances," not for a stated time, but until the further order of the court. There is nothing in the decree to indicate that he intended that anybody but Mrs. Emmons should "enjoy the use, benefit, and possession of the land." There is no suggestion that upon her death the real estate should go to her children. The decree closes with the statement:

"It is further ordered that the further consideration of the question of alimony and the property interests involved in said cause be, and the same are hereby, reserved for further order and decree herein."

—which is quite inconsistent with the idea that the title in fee to the real estate passed to her and her heirs by the decree.

Judgment is affirmed, with costs to the plaintiff.

NOTE—*Modification of Decree in Divorce Applies Only to What Concerns the Future.*—The conclusion the court arrives at in the instant case is quite incomprehensible. The opinion appears to concede, that had the husband defendant actually executed the conveyance the court directed, then the property would have vested in the wife so that her children would have inherited. But it is plainly stated that if the husband neglects to execute such conveyance within three months, then the decree shall operate in the same way as if he had executed it. It may "be regarded as such canveyance, and a certified copy thereof may be recorded * * * as evidence of such conveyance." If the decision is right in result, it must be because a decree in a divorce case does not operate to pass property absolutely, because it is subject to modification. Is this true?

In Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284, it is said: "There is a well recognized practice that an award of alimony is subject to modification at any time by the court that awarded

it or by an independent action in another court in either the same state or a foreign state, but such power to revise and alter a judgment for alimony does not apply to judgments in divorce actions making a final division and distribution of the husband's estate. Such a judgment cannot be reviewed or altered in this state after the term of court in which it was rendered."

In that state, then, a final judgment in a divorce case would stand like any other judgment—subject to amendment only during the term.

But independently of the right to modify decrees in divorce, it is greatly to be doubted whether the right applies to modify judgments for lump sums, or where no future payments are involved. In annotation, for example, to Weber v. Weber, 153 Wis. 132, 140 N. W. 1052, 45 L. R. A. (N. S.) 875, there is given an extensive annotation to a note entitled, "Modification of decree for alimony because of subsequent misconduct of former wife," and of the great number of cases cited all speak of monthly or other periodical payments.

In one of these cases it is said: "While it is competent for the court that grants a divorce from the bond of matrimony to commute the alimony and to assign a sum in gross or a specific portion of the husband's property to the wife for her support and maintenance, and thereby to make the decree for such allowance final in every respect, yet * * * if the court in fact allows to the wife divorced from the bond of matrimony which it would allow to a wife divorced merely from bed and board, it is not apparent why it should lose control of the one when it does not lose control of the other." Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806.

In Emerson v. Emerson, Md., 87 Atl. 633, a distinction in the question of modification is spoken of regarding alimony as a maintenance for the wife out of current income after divorce, and therefore subject to modification and not a division of the property.

And even in case of payments after the decree allusion is made to an allowance up to the rendition of the decree as being conclusive. Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56.

In Stanfield v. Stanfield, 22 Okla. 574, 98 Pac. 334, there was a monthly allowance made to the wife adjudged by the final decree, it was said: "After the divorce the parties go into the world as strangers to each other and generally even the adultery of the wife, except possible under special conditions not involved in this case, will not relieve the husband of the payment of alimony in accordance with the decree."

In the case the husband sought modification as to custody of children, but the court decided the case purely upon construction of the terms of the decree, refusing to modify it.

In English decision, periodical payments are affected by the clause, *"dum sola et casta,"* but where there is an order for permanent maintenance, this clause was not usually inserted. Medley v. Medley, L. R. 7 Prob. Div. 122, 51 L. J. Prob. N. S. 74.

In Flood v. Flood, 5 Bush (Ky.) 169, there was an attempt by a husband to secure a reconveyance of property conveyed to trustees, but this was refused, the court saying: "No doubt the Louisville Chancery Court properly adjudged a dissolution of the marital relations and restored to him the custody of his children, and adjudged to him all property which she had received from him by reason of the marriage or in consideration thereof; but it did not, nor could, adjudge to him the rights of property which had been secured to her use for life as a support in place of alimony." If this does not mean that what is settled as on the day of the rendition of a decree as distinguished from what may be modified in the future, I do not understand what is meant to be said.

It seems to me that the mobile character, so to speak, of a decree in divorce regarding property rights is in respect to what is applicable to future conditions as they arise. As to all it determines as to the past, it is as final and may be set up as *res judicata,* as any other judgment or decree. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 141.

Employment Fees.—Accepting employment upon contingent fee. Proper conditions indicated.—Is it, in the opinion of the Committee, consistent with the "essential dignity of the profession" for a lawyer to accept professional employment upon a contingent fee, even under the safeguards mentioned in Canon 13 of the American Bar Association?

If the Committee considers the practice to be, as a general rule, undignified or otherwise improper, does the Committee recognize as exceptions,

(a) Cases of commercial collections, tax-reductions or tax-refunds, and similar cases, in which it appears to be the universal custom to make compensation contingent upon success and measurable by the sum collected, refunded, etc.;

(b) Meritorious cases of any kind undertaken on behalf of poor persons?

Is the propriety of accepting employment on a contingent fee dependent to any extent upon the custom in that regard which prevails generally among members of the bar in the community wherein the lawyer in question practices?

ANSWER No. 141.

In the formulation of the canons of ethics of the American Bar Association, no subject

precipitated such debate as Canon 13, the one relating to contingent fees, which reads as follows:

"Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges."

Even as it was formulated after the debate, it has not been universally accepted. The Bar Association of Boston adopted instead the following:

"A lawyer should not undertake the conduct of litigation on terms which make his rights to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee should be a fixed percentage of what he recovers, or a fixed sum, either of which may exceed reasonable compensation for any real service rendered.

"Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful, their fees shall be fixed sums or percentages, are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it, he in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interest, in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial."

Experience shows that the contingent fee, as a general practice in any branch of the law, has a tendency to breed the twin evils of solicitation of employment and improper division of fees. It develops both in the lay and in the professional mind a conception of the practice of the law as a business, not as a profession, and tends to lower the essential standards of the Bar.

While we recognize that under existing standards each lawyer is largely the judge of the soundness of his conduct in such cases, we think that the time has come for the members of the American Bar in their respective states to reconsider the basis for the existing law upon the subject and to consider whether all contingent fees should not by law be made subject to summary review by a Court on the application of the client.

As to the specific inquiry (a) put by the inquirer, the Committee can see no reason for applying any different principle.

As to the case (b), the Committee is of opinion that, while the practice of the contingent fee finds some justification in "meritorious cases * * * undertaken on behalf of poor persons," nevertheless such arrangements should also be under the complete supervision of the Court.

So long as the present practice prevails generally among members of the Bar in any community, this Committee cannot assume to say that there is any impropriety in lawyers practicing in such communty accepting such cases, where they are unsolicited.

BOOK REVIEWS.

ZOLINE'S FEDERAL APPELLATE JURISDICTION AND PROCEDURE.

This kind of jurisdiction is one in which there are many slips by those invoking it. But in the great majority of cases the law on the subject easily may be found. The subject is not taught in the schools. It must be learned by careful search of statutes and decisions interpreting them.

The work above indicated by Mr. Elijah N. Zoline of New York and Chicago Bar and revision thereof by Mr. Stephen A. Day of Chicago and Cleveland Bar is especially helpful to the practitioner. Its propositions are fortified by a great abundance of authority, and there is an appendix of Federal Forms apparently very complete.

The binding is in buckram, the typography and paper excellent and the work comes from the law book house of Clark Boardman Co., Ldt., New York, 1917.

BOWERS ON THE LAW OF CONVERSION.

This work by Mr. Renzo D. Bowers, of Roswell, New Mexico, who is known to the profession as the author of "The Law of Waiver," a very excellent work, is a well conceived, well executed and very practical treatise on the Law of Conversion. This treatise relates in no way to equitable conversion but to that in which

exists an intent so as to make one liable for acts of dominion wrongfully exerted over the property of another, that is, if this dominion is over personal, as distinguished from real property.

The subject gives scope for treatment of a great variety of situations and relations, as well as the character and kind of personal property regarding which conversion may be charged. Thus see relation of principal and agent, mortgagor and mortgagee, pledgor and pledgee, bailor and bailee and where between parties no conventional relation exists.

The author speaks of waiver of conversion, evidence, burden of proof, presumption, manner of proof and admissibility thereof, measure of damages, the value of plaintiff's interest in converted property and the trial of causes in conversion.

On the whole, we repeat that the work is a most useful and timely book. It is typographically well executed, is bound in law buckram and is published by Little, Brown & Company, Boston, 1917.

HUMOR OF THE LAW.

"Germany declares that with her unrestricted submarine campaign she'll hold up meat, she'll hold up cotton, she'll hold up munitions, she'll hold up all neutral maritime commerce. But maybe, instead of that, she'll hold up her hands before she gets through."—Henry Flood.

"One summer afternoon," relates an American who has spent a bit of his time in China, "a young girl passed in the street of Chuanchow, where a shabby scholar sat reading to a group of idlers outside the prefect's yamen. She had sold her last doughnut, and the day's earnings lay in her empty basket. Some one noticed how absorbed she was; a deft hand moved lightly, and the money disappeared from the basket.

"When the story came to an end, the girl awoke from her dream to find that the precious pile of cash was gone. She spoke of her loss to the people who stood near, and, with the callousness of a Chinese crowd, they all laughed. At that moment the prefect came out of the yamen, noticed the child's grief, and inquired the cause of her trouble. He waited patiently while the girl told her tale between sobs. Meantime a crowd had collected, and the prefect gave orders that the girl be taken to the justice hall, that the case might be tried. When the people saw him re-enter, they trooped in after him, and even the idlers crowded into the yamen to see the fun.

"The examination came to an end without throwing any additional light on the theft, and some of the bystanders began to laugh. His excellency spoke a word to the attendants, and the great doors of the yamen closed with a clatter. 'Such a breach of etiquette must be punished,' said the prefect, speaking slowly and with emphasis. 'Each person shall pay a fine of eight cash before he leaves the court.'

"As the first man laid his cash upon the table, the prefect's eyes scanned his face. Then, to the surprise of everybody, the great man carefully counted the coins with his own fingers. The brown heaps of money increased, and presently a mean-looking fellow came up and paid his fine. His excellency counted the coins. 'This money is covered with grease,' he said. 'What right have you to bring dirty cash to me? Pay eight more for your bad manners.'

"The man put the money on the table without a word.

"'What!' cried the prefect, 'these coins are also covered with grease. It is against the law to pay dirty money into court. Turn out all the money you have. There are sure to be some clean coins among the number.'

"The attendants emptied the fellow's pockets and found 92 coins.

"'Ah! 92 cash, along with the 16 already paid in fines, makes 108—exactly the amount lost by the little girl. How do you account for that?'

"'It is just the sum I had in my pocket.'

"'Where did you get the cash?'

"'I got them from a man in the street in exchange for a large coin. He must have given me greasy money.'

"'Go at once and fetch that man. I will send a runner with you to bring him into court.'

"The man lay in a position that he had to take before the representative of the government, with his head flat upon the pavement, and said nothing.

"'You took this money from the child,' went on the prefect. 'It is covered with grease because she counted it after handling her oily doughnuts. She lost 108 cash, exactly the sum that was in your pocket when you entered the yamen. You are the **thief**!'"—Ohio Law Bulletin.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn

1. **Adverse Possession**—Evidence.—That some of the neighbors thought a tract of wooded swamp land formed part of an adjoining plantation was not an act of possession.—Sessions v. Tensas River Planting Co., La., 76 So. 816.

2. **Attachment**—Special Attachment.—Where person purchased land, and title was conveyed to him as trustee, under declaration of trust signed by himself and four others, who paid no money and indorsed to purchaser certificate of interest, "special" attachment of all right, title, and interest of persons in parcel as described, record title to which stood in his name as trustee, was valid.—Cunningham v. Bright, Mass., 117 N. E. 909.

3. **Assault and Battery**—Force Against Entry.—Where title to house was in dispute and defendant was in possession, his use of force to prevent entry by one which another claimant was attempting to put in possession, held not an assault.—McGlothlin v. State, Tex., 198 S. W. 784.

4. **Attorney and Client**—Disbarment.—Ky. St. § 97, preventing any person convicted of treason or felony from practicing law in any of courts of commonwealth, does not mean that only those who have been convicted of a felony or treason may be disbarred.—Chreste v. Commonwealth, Ky., 198 S. W. 929.

5.——Fees.—Attorney, who represented corporation and majority shareholder in suit by minority shareholder, wherein majority holders were enjoined from carrying out conspiracy to waste corporate assets, held not entitled to have court fix fees, but he will be left to his remedy at law.—Davidson v. American Blower Co., U. S. D. C., 245 Fed. 773.

6. **Bankruptcy**—Composition.—Where bankrupt omitted from financial statement debts for goods purchased for future trade, held that his offer of composition must be denied.—In re Kerner, U. S. D. C., 245 Fed. 807.

7.——Dividends.—Under Bankruptcy Act, §1, subsec. 23, and sections 57e, 57h, secured creditor, which realized upon collateral, held entitled only to dividend on balance, though it had no notice that collateral was bankrupt's property.—In re Bash, U. S. D. C., 245 Fed. 808.

8.——Judicial Review.—When a trustee in bankruptcy takes over property in hands of a state receiver, as far as title to property is concerned, the adjudication relates back to the date of the filing of the petition, and makes subject to review only actions of the receiver or the state court appointing him.—Carter-Mullaly Transfer Co. v. Robertson, Tex., 198 S. W. 791.

9.——Liens.—The lien of an execution, levied more than four months prior to bankruptcy, but under which no sale had been made, held good as against the trustee in bankruptcy.—In re Zeis, U. S. C. C. A., 245 Fed. 737.

10.——Statement of Assets.—A bankrupt's written statement of his financial condition from which liabilities are omitted cannot be defended on the ground that assets were also omitted, and that the balance was therefore substantially correct.—In re Maaget, U. S. D. C., 245 Fed. 804.

11. **Banks and Banking**—Unlawful Dividend.—Officers and directors of a banking corporation, who participated in the declaration of a dividend out of the capital of the corporation, which was then insolvent, are liable to the receiver to the amount of the dividends received by them.—Wood v. Noyes, U. S. C. C. A., 245 Fed. 742.

12.——Usage.—Though articles of incorporation of bank did not formally provide for voting by proxy on question of dissolution, such voting held permissible by usage and because not objected to.—Rossing v. State Bank of Bode, Iowa, 165 N. W. 254.

13. **Beneficial Associations**—Local Councils.—The Grand Master of a lodge in the absence of pleading or evidence to show authority upon his part, held not authorized to bind the lodge in an application for fidelity insurance for the treasurer.—Western Indemnity Co. v. Free and Accepted Masons of Texas, Tex., 198 S. W. 1092.

14. **Bridges**—Speed Regulation.—St. 1915, § 1323, relating to riding or driving over bridge faster than a walk, is not applicable to automobiles, and does not give a city power to regulate their speed.—City of Baraboo v. Dwyer, Wis., 165 N. W. 297.

15. **Brokers**—Bad Faith.—Where brokers knew customer they had procured for principal's farm could not perform agreement to convey property in return unless he could raise loan on farm to discharge incumbrances on his property, and they agreed to procure loan, and concealed

facts from principal, their bad faith precluded them from recovering commission.—Pugh v. Christensen, Wis., 165 N. W. 294.

16. **Cancellation of Instruments**—Vendor's Lien.—Transferee of purchase-money note given for land is not necessary party to vendor's suit to cancel conveyance for fraud, etc., if he has valid lien to secure note, and desires to foreclose it, judgment in suit cannot affect his rights.—McKenzie v. Frey, Tex., 198 S. W. 1009.

17. **Carriers of Goods**—Misdelivery.—Under Vernon's Sayles' Ann. Civ. St. 1914, art. 710, requiring carriers to deliver goods as provided by common law, etc., a carrier is liable for misdelivery made in good faith and without negligence, unless error was caused by consignor.—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Tex., 198 S. W. 1067.

18.——Proximate Cause. — Where plaintiff shipped a piano to a point 163 miles distant, and 15 days later, while standing in way yards, it was damaged by the Dayton flood, the proximate cause was the act of God, and not the delay, and the carrier was not liable.—Chicago & E. Ry. Co. v. Schaff Bros. Co., Ind. 117 N. E. 869.

19.——Waybill.—Since the shipper is not a party to the waybill made out for the convenience of connecting carrier he is not bound by it, and it is not admissible in evidence against him to show the destination of the goods.—Quanah, A. & P. Ry Co. v. Warren, Tex., 198 S. W. 814.

20. **Carriers of Live Stock**—Negligence.—Where a carrier gave hogs no attention or care during delay in shipment causing exposure and death, though it considered storms such as to justify delay, it was negligent.—Gormley v. Chicago & N. W. Ry. Co., S. D., 165 N. W. 249.

21.——Notice of Shipment.—Provision in contract for interstate shipment of live stock, that, as a condition precedent to recovery of damages, written notice of loss or injury be given to carrier within a day after delivery at destination, is valid, and failure to give such notice bars action for damages.—Chicago, R. I. & P. Ry Co. v. Brockmeier, Okla., 168 Pac. 1011.

22. **Carriers of Passengers**—Alighting.—In action by plaintiff for injury from being struck by passing automobile while she was alighting from defendant's street car, negligence of driver of automobile would not relieve defendant, if it also was negligent.—Woods v. North Carolina Public Service Co., N. C., 94 S. E. 459.

23.——Employes.—A contract of a railroad to furnish transportation to employes back to their home state after they quit working or are discharged is not binding under the Hepburn Act of Junt 29, 1906, prohibitjng giving free transportation.—Southern Ry. Co. v. Linear, Tenn., 198 S. W. 887.

24.——Proximate Cause.—Failure to stop train at flag station on signal of a woman wishing to take passage is not proximate cause of her injury from falling into cattle guard, she needlessly attempting to walk to her destination on the track.—Brown v. Linville River Ry. Co., N. C., 94 S. E. 431.

25.——Intending Passenger.—One intending to become railroad passenger has right to go to station within reasonable time before train's departure, and has to do anything proper to facilitate loading baggage on train, and road owes him duty to exercise ordinary care for his safety.—Baker v. Williams, Tex., 198 S. W. 808.

26.——Proximate Cause.—Any negligence of porter of Pullman car on siding in city, in temporarily leaving it with door closed, and a woman passenger alone therein, held not proximate cause of any injury to her from fright on her unsuccessful effort to open door.—Pullman Co. v. Gutierez, Tex., 198 S. W. 1065.

27.——Trespasser.—Conceding that a person on a passenger train was a trespasser, the railroad was liable if he was injured when required by its employes to get off a train moving 15 miles an hour.—Missouri, K. & T. Ry. Co., of Texas v. Anderson, Tex., 198 S. W. 795.

28. **Chattel Mortgage**—Deficiency.—In action on notes secured by chattel mortgage on threshing machine engine after sale of engine, leaving a deficiency where plaintiff pleaded a public sale under the mortgage, it could not recover on a subsequent private sale not pleaded, but concealed during the former trial.—Aultman-Taylor Machinery Co. v. Forrest, Colo., 168 Pac. 1119.

29.——Recission.—A deed of trust to cover advances to a tenant, where the owner immediately refuses to make the advances, cannot be used as a basis for appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces and offers possession, such acts being in effect a recission of the deed.—Burton v. Pepper, Miss., 76 So. 762.

30. **Commerce**—Employe.—Employe, pumping water into tank for use of engines engaged in interstate commerce, held engaged in such commerce, where such use of the water is not dependent on any remote possibility.—Collins v. Erie R. Co., U. S. D. C., Fed. 811.

31.——Meat Inspection.—That fees collected for inspection of meat, both originating within and shipped into the state, are apportioned to a common fund and jointly used to pay the entire cost of inspection, does not raise presumption that the fees for interstate inspection are excessive, and that the ordinance is therefore in violation of Const. U. S. art 1, § 10, prohibiting imposts.—Boyd v. City of Louisville, Ky., 198 S. W. 927.

32. **Constitutional Law**—Interest in Question. —Injured employe, having no right of recovery except under Employers' Liability Law, was without interest to question its constitutionality. —Woodruff v. Producers Oil Co., La., 76 So. 803.

33.——Religious Freedom. — Notwithstanding constitutional provision as to religious freedom, held, that it was an offense to pretend to believe in supernatural powers for the purpose of procuring money and to use the mails in pursuance of such purpose.—New v. United States, U. S. C. C. A., 245 Fed. 710.

34. **Contracts**—Illegality.—Where a contract between plaintiff and defendant for the organization of a corporation contemplated that they should each be directors, an agreement that each should vote for the other for offices was illegal.—Lothrop v. Goudeau, La., 76 So. 794.

35.——Quantrum Meruit.—Modification of rule that one suing on a contract must show performance of antecedent obligations, allowing recovery on quantum meruit in case of building or improvement contracts where substantial performance is shown, does not apply where contract provides a specific method of adjustment in case of breach.—R. A. Poe & Co., v. Town of Brevard, N. C., 94 S. E. 420.

36. **Corporation**—Bondholders.—Where a corporation's property mortgaged to secure bonds was leased to another corporation under agreement that royalties should be paid to the trustee to care for the interest payments on the bonds, the lessor corporation and one of its officers could not bind the other bondholders without their consent to a second agreement that royalties should be paid to the officer on agreement to care for interest payments on certain bonds to the exclusion of others.—Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., Cal., 168 Pac. 1037.

37.——Employment of Counsel.—President of corporation held empowered to employ counsel to defend action against corporation, unless forbidden, though not directed to do so by the directors.—Blue Goose Mining Co. v. Northern Light Mining Co., U. S. C. C. A., 245 Fed. 727.

38.——Estoppel.—Where a corporation has borrowed money and used it to advantage for three years, it is estopped to set up that the loan was for an unlawful purpose and ultra vires, especially where there is a presumed finding that the lender did not know of the unlawful use. —Carter-Mullaly Transfer Co. v. Robertson, Tex., 198 S. W. 791.

39. **Dedication**—Intent.—An intention to dedicate will be more readily presumed in regard to urban than to country property, and in regard to well-settled country than in regard to wild, wood, or waste land.—Wiehe v. Pein, Ill., 117 N. E. 849.

40. **Deeds**—Quitclaim.—A girl 18 years of age who did not know what her interest was in land, who was uneducated and told a quitclaim deed was but a paper giving the grantee the power of managing the land for her, held entitled to cancellation on the ground of fraud and want of consideration.—Crodle v. Dodge, Wash., 168 Pac. 986.

41. **Dower**—Inadequate Consideration.—A conveyance for a grossly inadequate consideration, and for purpose of defeating dower rights, made by a man shortly before marriage, will be avoided, so far as affecting dower.—Robers v. Robers, Ark., 198 S. W. 697.

42. **Drainage**—Plans and Specifications.—Where, as required by statute, an accurate map of the entire drainage system, showing the plans of the entire district, the route and width of the canal and all its branches, the different levels of the various points, the bottom and grade of the proposed improvements, the total yards of excavation, with the estimated cost, and the plans and specifications and the costs of any other work required to be done, was present at the hearings, the landowner had ample opportunity to determine the damage to his land and the timber.—Beaufort County Lumber Co. v. Drainage Com'rs, N. C., 94 S. E. 457.

43. **Electricity**—Res Ipsa Loquitur.—Unexplained, the fact of feed cable of street railroad being broken loose from fastening to iron pole at street side, and at intervals coming in contact with pole, shocking a boy, raises a presumption of negligence under res ipsa loquitur doctrine.—Bennett v. International Ry. Co., N. Y., 167 N. Y. S. 690.

44. **Eminent Domain**—Abandonment.—Water company, having begun proceedings to condemn land for its site, an award of damages having been made and confirmed, without appeal therefrom, could not thereafter abandon the proceedings, the property owner having acquired a vested interest in the award.—York Shore Water Co. v. Card, Me., 102 Atl. 321.

45. **Execution**—Reversal of Judgment.—If officer has such execution as will protect him, and the sale he makes is fair, it is concluded when the property is delivered to the purchaser, and will be divested because the judgment may be thereafter reversed.—Webb v. Webb's Guardian, Ky., 198 S. W. 736.

46. **False Imprisonment**—Arrest.—"False imprisonment" may arise without actual arrest, assault, or imprisonment, and may be committed by words alone, or by acts alone, or both.—Riley v. Stone, N. C., 94 S. E. 434.

47.——Malicious Prosecution.—Declaration alleging bringing of suit for excessive amount resulting in plaintiff being sent to jail for inability to procure bail, held to state a case for malicious prosecution and not for false imprisonment or abuse of process.—Roberts v. Danforth, Vt., 102 Atl. 335.

48. Private Party Requesting Arrest.—Private person requesting officer to make arrest and suggesting necessity of warrant, and who does not assist officer in making arrest for which officer deemed warrant unnecessary, is not liable for false imprisonment.—Allen v. Lopinsky, W. Va., 94 S. E. 369.

49. **Fraud**—Opinion.—Statement by corporation's representative, to induce defendant to exchange his stocks for its bonds and to renew stock notes, that bonds were as good as gold and that he could resell them, was mere statement of opinion and not such misrepresentation of fact as to be actionable fraud. —Thorpe v. Cooley, Minn., 165 N. W. 265.

50. **Frauds, Statute of**—Debt of Another.—Where plaintiff let one have goods on another's verbal promise that he would see that debt was paid and charged account to both, the promise was a promise to pay the debt of another, and not being in writing was void.—McAfee v. Benson Bros. & Co., Ga., 94 S. E. 328.

51. **Garnishment**—Pleading and Practice.—Where defendants in assumpsit, pleaded that they had been served with trustee process, objection by plaintiff corporation that such process had not been served on it did not avoid the plea, since the question whether an order for service of the trustee process on the principal defendant, the plaintiff herein, could be granted was a matter to be determined in the trustee case, and not in the assumpsit, to which plaintiff in the trustee suit was not a party.—Piedmont & Georges Creek Coal Co. v. Perry, Me., 102 Atl. 327.

52. **Gifts**—Presumption.—When a father is old and infirm, and the money or other property given to a son constitutes his whole estate, and the circumstances tend to rebut the presumption of a gift, question whether a gift or a loan was intended held for the jury.—Hix v. Scott, W. Va., 94 S. E. 399.

53. **Highways**—Reckless Driving.—Testimony that team just ahead of plaintiff's also became frightened by defendant's automobile was admissible as circumstance tending to show that defendant was driving recklessly.—Conrad v. Shuford, N. C., 94 S. E. 424.

54. **Homestead**—Estoppel.—Where wife joined in deed of warranty merely to relinquish dower, but on breach of warranty suffered default judgment against her, she was thereby concluded, and her homestead acquired with her money after making the deed, was not exempt.—Miracle v. Purcifull, Ky., 198 S. W. 753.

55. **Injunction**—Forfeiture.—Under contract for timber, whereby defendant was to make certain improvements as part consideration within two years or forfeit deposit, and subsequent contract that improvements be made before certain date, but not referring to forfeiture, it was erroneous to enjoin further cutting and decree cancellation of contract before two years had expired, without ordering return of deposit or accounting.—McClurg v. Hicks, Miss., 76 So. 736.

56. **Insurance**—Accident—Accident policy, insuring against scheduled injuries, including death, held to cover death by murder, notwithstanding clause that insurance shall not extend to loss due to act of another to "injure" insured.—Interstate Business Men's Accident Ass'n v. Dunn, Ky., 198 S. W. 727.

57.——By-Laws.—A clause in by-laws of mutual association limiting liability to "death by accidental means," held not inconsistent with the policy allowing benefits for "accidental death."—Pledger v. Business Men's Accident Ass'n of Texas., 198 S. W. 810.

58.——Intentional Killing.—Whether accident policy containing no specific exception covers intentional killing by third person depends on whether insured, being in the wrong, was the aggressor under circumstances rendering a homicide likely.—Clay v. State Ins. Co., 94 S. E. 289.

59. **Intoxicating Liquors**—Burden of Proof.—In prosecution for manufacturing liquor in violation of Pub. Laws 1917, c 157, state need not show spirituous liquor was actually produced at still where defendant was arrested, and if persons operating it had been caught in act of making liquor they could be convicted, though process had not reached final stage.—State v. Horner, N. C., 94 S. E. 291.

60. **Joint Adventures**—Abandonment.—A coadventurer does not forfeit his interest in joint property or assets acquired with money he has paid or advanced, by his abandonment of the enterprise, failure to contribute to its expenses, or opposition to its prosecution.—Kaufman v. Catzen, W. Va., 94 S. E. 388.

61. **Landlord and Tenant**—Harvesting Ice.—Defendants could not acquire by adverse possession right to harvest ice from disputed portion of river, while they held same as lessees and paid rent for the use.—Whittier v. Montpelier Ice Co., Vt., 102 Atl. 332.

62.——Estoppel.—Rule that tenant is estopped to deny landlord's title in action against him by landlord applies, where tenant was let into possession by landlord, or thereafter retained possession of land under lease.—Rosin Coal Land Co. v. Martin, W. Va., 94 S. E. 358.

63.——Oral Agreement.—If sued for rent by grantee of store premises, lessee could not have escaped payment by proving oral agreement between grantor lessors and grantee that former should receive accruing rent until close of term.—Taylor v. Kennedy, Mass., 117 N. E. 901.

64. **Libel and Slander**—Instructins.—Instructing that in determining whether defendant uttered slander, "with an honest belief" in its truth, jury shall judge his conduct by degree of care and caution of ordinarily prudent man under like circumstances, held proper.—Sullivan v. McCafferty, Me., 102 Atl. 324.

65.——Privileged Communication.—Employer's accusation that employe had taken goods from store and asking her to write down a few of the things she had taken was slanderous and actionable per se, unless it was true or privileged, and, if false and not privileged, he was liable.—Riley v. Stone, N. C., 94 S. E. 434.

66. **Mandamus**—Appropriate Remedy.—Mandamus is appropriate remedy to compel county depository under depository act (Acts 1915, c. 84) to credit sheriff with interest on public funds in its hands and to pay his lawful orders upon it.—Belcher v. First Nat. Bank, W. Va., 94 S. E. 380.

67.——Right to Issue.—Mandamus will lie to compel a district judge to render judgment in a cause which has been tried on its merits, and where he has ordered an indefinite continuance of the cause after the trial.—Delord v. Lozes, La., 76 So. 759.

68. **Master and Servant**—Casual Employment.—Where the servant was employed casually not under contract, but on various odd jobs, as plasterer in repairing building for defendant, who owned apartment houses, he was not in employ of the company in business declared hazardous by the Workmen's Compensation Law.—Solomn v. Bonis, N. Y., 167 N. Y. S. 676.

69.——Commerce.—Where complaint showed employe was pumping water into tank for use of engines engaged in interstate commerce, held, that it might be inferred on demurrer that such use was immediate, and not dependent on remote possibilities.—Collins v. Erie R. Co., U. S. D. C., 245 Fed. 811.

70.——Evidence.—A letter signed in name of defendant corporation, followed by an individual's name, complaining of collision with its truck by plaintiff's auto, held sufficient evidence of defendant's ownership of truck.—Wood v. Indianapolis Abattoir Co. of Kentucky, Ky., 198 S. W. 732.

71.——Fellow Servants.—Company chartered as railroad corporation and operating railroad, though only for private purposes of a cement company, held within Const. § 162, and Code 1904, § 1294k, abolishing the fellow-servant doctrine.—Wilson's Adm'x v. Virginia Portland Ry. Co., Va., 94 S. E. 347.

72.——Hazardous Employment.—Assisting in procuring men and materials for the work, held incident to hazardous employment of foreman of road construction for town (Workmen's Compensation Law, § 2, groups 13, 43, and section 3, subds. 3, 4), entitling him to compensation for injury therein.—Lanigan v. Town of Saugerties, N. Y., 167 N. Y. S. 654.

73.——Hours of Service Act.—Releases of train crews for short periods held not to break continuity of service, within Hours of Service Act, where the men were required to hold themselves in readiness to respond to a call for their services when needed.—United States v. Southern Pac. Co., U. S. C. C. A., 245 Fed. 722.

74.——Negligence.—If master allowed elevator to descend while plaintiff was underneath repairing frame, and if he had been induced to believe by previous conduct that it would not be moved, negligence is clear.—Taylor v. Tallassee Power Co., N. C., 94 S. E. 432.

75.——Negligence.—In action admittedly under federal Employers' Liability Act, negligence of employe using maul, head of which flew off and struck plaintiff, held not a defense.—Kight v. Vicksburg, S. & P. Ry. Co., La., 76 So. 799.

76.——Workmen's Compensation Act.—Passerby, requested by driver of relator's mired coal wagon to assist in releasing it, was the relator's servant, and entitled under Workmen's Compensation Act to compensation for injury while so assisting.—State v. District Court of Ramsey County, Minn., 165 N. W. 268.

77.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 3, subd. 7, defining injury and personal injury, employe, receiving accidental injury arising out of and in course of his employment, held not entitled to

compensation for permanent disability by loss of sight by reason of pre-existing syphilitic condition, not itself naturally and unavoidably resulting from the injury.—Borgsted v. Shults Bread Co., N. Y., 167 N. Y. S. 647.

78. **Mortgages**—Relation Back.—Deed of trust to secure notes intended to be negotiated by grantor to third persons is valid, although no money passes at its execution, as the consideration subsequently furnished by purchaser of notes will relate back and sustain the deed.—Pence v. Jamison, W. Va., 94 S. E. 383.

79. **Municipal Corporations**—Barriers in Street.—Cities are not generally required to erect barriers along highways to prevent travelers from falling into nearby excavations, but where an unguarded pit endangers travelers using street with ordinary care, reasonable precaution requires city to place a guard, and its failure to do so is negligence.—City of Wabash v. Bruso, Ind., 117 N. E. 867.

80.——Constitutional Law.—Giving of demand note by mayor and council of a town, before collection and payment of taxes, to pay for street lighting, did not violate Const. art. 7, § 7, par. 1, forbidding municipal debts, without assent of two-thirds of qualified voters at an election therefor.—City of Hogansville v. Planters' Bank, Ga., 94 S. E. 310.

81.——Paving Contract.—Where a paving contract provided that on breach thereof the town could do the work itself and charge the cost against the contract price, the town will not be credited for an increase in cost occasioned by using better material than the contract called for.—R. A. Poe & Co. v. Town of Brevard, N. C. 94 S. E. 420.

82.——Plats.—An inartistic and not exactly accurate plat, and such as, in connection with the description, would enable any one readily to ascertain the territory to be severed from the municipality was a substantial compliance with Code, § 622, requiring a plat to be attached to the petition for severance of territory.—Estrem v. Town of Slater, Iowa, 165 N. W. 263.

83.——Speed Regulations.—Under St. 1915, § 1636—49, prohibiting unreasonable speed of automobiles, and making the speed limit in unusual circumstances, depend upon the particular facts of the case, and section 1636—55, providing that local regulations can only be made in strict conformity with statutes an ordinance fixing a limit of 10 miles over all bridges, regardless of condition, is invalid.—City of Baraboo v. Dwyer, Wis., 165 N. W. 297.

84.——Statutory Construction.—A beaten path used by pedestrians and running across street is not "intersection of highways" within the meaning of statute requiring driver of automobile to give signal on approaching such an intersection.—Aiken v. Metcalf, Vt., 102 Atl. 330.

85.——Street Assessment.—Oiling of city streets being permanent improvements, preserving and making streets more lasting for travel, reasonable part of cost may be assessed against street railway using such streets.—Henderson Traction Co. v. City of Henderson, Ky., 198 S. W. 730.

86. **Names**—Idem Sonans.—Under rule of idem sonans names Doke and Dope are sufficiently alike in sound as not readily to suggest a difference to hearer.—Rhodes v. State, Fla., 76 So. 776.

87. **Negligence**—Anticipating Injury.—A gas company whose employes leave a hole in the floor in a closet in a dwelling cannot escape liability on the theory that it could not be anticipated that the occupant would go into the closet.—Louisville Gas & Electric Co. v. Nall, Ky., 198 S. W. 745.

88. **Parties**—Joinder of.—Where repair work was done on gas pipes in a dwelling by a plumbing company and by the gas company, one of which left the floor in a dangerous condition, causing injuries to the lessee, she could join both parties as defendants, alleging one act of negligence.—Louisville Gas & Electric Co. v. Nall, Ky., 198 S. W. 745.

89. **Principal and Surety**—Signatures.—Where after signature of promissory note appeared the word "principal," and other signatories were characterized as "sureties," payee was charged with notice of relations between principal debtor and sureties.—Durfee v. Kelly, Mass., 117 N. E. 907.

90. **Process**—Usual Place of Abode.—Where unmarried woman owning house in Mississippi left it in occupancy of sister's family and went to California, remaining for two years, intending to remain for indefinite time, residence in California was "usual place of abode" while away within Code 1906, § 3926 (Hemingway's Code, § 2933), relative to service on absent defendant by posting.—Hendricks v. Kellogg, Miss., 76 So. 746.

91. **Railroads**—Licensees.—That public may have been accustomed to travel along a portion of railroad right of way and no measure have been taken to prevent it does not constitute such persons licensees of the company, and they are only trespassers.—Pope v. Seaboard Air Line Ry., Ga., 94 S. E. 311.

92.——Wanton Destruction.—Railroad, whose wrecking crew, in repairing tracks willfully and wantonly destroyed plaintiff's schooners, which a violent gale had carried upon the tracks, held liable for their value.—Louisville & N. R. Co. v. Joullian, Miss., 76 So. 769.

93. **Receivers**—Appointment.—Only the gravest emergency will entitle one to the appointment of a receiver without notice, under Code 1906, § 625, providing that "good cause" must be shown why notice should not be given.—Burton v. Pepper, Miss., 76 So. 762.

94. **Set-off and Counter Claim**—Money Had and Received.—In action ex contractu a cross-action for plaintiff's conversion of defendant's property, not appearing to have been converted into money, cannot be construed as action for money had and received, but will be construed as action ex delicto, which ordinarily cannot be maintained as cross-action in action ex contractu.—Henderson v. Hardeman & Phinizy, Ga., 94 S. E. 317.

95. **Telegraphs and Telephones**—Ordinary Care.—Telephone company, while bound to use reasonable care to keep its poles and wires in such condition as will make highway reasonably safe, is not liable for break from unknown defect occuring after nightfall, where it was repaired immediately on discovery in morning.—Wells v. Cumberland Telephone and Telegraph Co., Ky., 198 S. W. 721.

96. **Vendor and Purchaser**—Defence.—When deed is made and possession is taken thereunder, want of title will not enable purchaser to resist payment of price while he retains deed and possession, and has been subjected to no inconvenience or expense.—Rook v. Wright, Ind., 117 N. E. 864.

97. **Wills**—Defeasible Fee.—Will devising lands to one "to be hers during her lifetime, and then to go" to others, and "if they should die without any bodily heirs then said lands to go back to" other persons, creates a fee subject to be terminated by the happening of the death or a shifting use operating by way of an executory devise.—Kirkman v. Smith, N. C., 94 S. E. 423.

98.——Devise.—Where will required devisees to deliver bale of cotton to widow annually, contention that by consenting to partition she waived any lien or right not specifically preserved, held without merit.—Roberts v. Burwell, Miss., 76 So. 738.

99.——Homestead.—Where husband dies testate seized of a homestead, and widow elects under statute, and renounces provision of will, court will first award her homestead interest not subject to debts of deceased, under Rev. St. 1913, § 3092, and then award her share as heir in remainder, under section 1905.—In re Grobe's Estate, Neb., 165 N. W. 252.

100.——Trust.—A will devising land "in trust for the benefit of" one named, created a trust, although it attempted to place conveyance to the beneficiary on the sole judgment of the trustee as to when the beneficiary should become a "careful and prudent man," and allowed the trustee to sell or keep the land for himself.—Keating v. Keating, Iowa, 165 N. W. 74.